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No. _____

In the Supreme Court of the United States

October Term, 1981

ROSE M. SALAZAR,

Petitioner,

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. In a disparate treatment discriminatory discharge case, do the district court's Findings of Fact comply with Federal Rule of Civil Procedure, Rule 52 (a) where no subsidiary findings are made concerning the evidence of disparate treatment and pretext?

2. Is the appellate court bound to review ultimate factual findngs of no discrimination by the clearly erroneous standard, or may it disregard the findings and determine whether or not there was discrimination based on subsidiary findings or the record?

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SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BRIEF FOR PETITIONER

Rose M. Salazar petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decree of the United States District Court for the Northern District of California.

ORDER AND OPINIONS BELOW

The unreported opinion and judgment of the Court of Appeals is reproduced in full as Appendix A to this

Petition. The unreported Findings of Fact and Conclusions of Law by the district court are reproduced in full as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULES INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act, as amended (42 U. S. C. §§ 2000e, et seq.) are as follows:

For the purposes of this subchapter—

• • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person. . . .

42 U.S.C. 2000e(b)

It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. 2000e-2(a)

The relevant provision of the Federal Rules of Civil Procedure is as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

Rule 52(a), Federal Rules of Civil Procedure

STATEMENT OF THE CASE

Petitioner filed this action on February 23, 1973 alleging, *inter alia*, that Respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

200Je, *et seq.* by discriminating on the basis of her sex and national origin when it disciplined, discharged, and denied adequate grievance procedures to her.[1] Petitioner also alleged discriminatory denial of a salary increase, and various promotional opportunities.[2] Federal jurisdiction was predicated upon §706(f) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(f)).

Following a lengthy trial, the district court entered judgment for Respondents on all issues on January 24, 1975. The court found that Petitioner was discharged because of unauthorized absence from work, and a prior history of poor performance, including her record of absences and her inability to get along with supervisors and co-workers. (Finding of Fact No. 13). The court concluded that "plaintiff was not terminated because of her sex or national origin. . . . She was terminated for legitimate, non-discriminatory reasons, which were not used as a pretext for sex or national origin discrimination." (Finding of Fact No. 15).

The court also found that "plaintiff is a female of Mexican-American national origin. Her national origin is not apparent from her appearance or speech. During her employment, no BART management employee, including her supervisor, was aware of her

[1]The case was tried as a disparate treatment case. See e.g. *McDonnell Douglas Corp. v. Green* (1973) 411 U. S. 792.

[2]To focus the issues, this Petition only addresses the discriminatory discipline and discharge claims.

national origin. . . . In fact, she told her friend and fellow employee, Lizzie Payne, that she was not Mexican-American, but 'white'". (Finding of Fact No. 2)

The Ninth Circuit affirmed the district court's decision, holding, *inter alia*, that "we cannot say that the district court's findings of fact are clearly erroneous. We cannot disturb the district court's finding that there was no discriminatory motive, especially in light of the absence of any evidence that Salazar's supervisors at BART were aware that she is Mexican-American."

The evidence introduced by Petitioner during the ten day trial consisted almost entirely of evidence of disparate treatment and other evidence calculated to establish that the employer's proffered justification for the discharge was pretexual. Indeed, before the Ninth Circuit Respondent conceded that Petitioner had made out a prima facie case of discrimination.

Statistical evidence was introduced to demonstrate that Respondent's management and supervisory employees were nearly entirely anglo[3] and white, and that Petitioner's supervisors were anglo and white, while the general labor force employed by Respondent under-utilized Mexican-Americans and women, when compared to the relevant labor pool. Petitioner testified that her supervisors used derogatory ethnic expressions when describing minority employees.

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[3]The term "anglo" is used to describe persons of Northern European ancestry.

Disparate treatment evidence included evidence that anglo females, and males with attendance and personality problems comparable to those alleged of Petitioner were not discharged or, in some cases, even seriously disciplined. For example, Petitioner's anglo co-worker, Alvina McIntyre had a comparable attendance record (indeed the supervisor kept attendance records *only* for Petitioner and Ms. McIntyre), and a history of serious personality conflicts with co-workers including Petitioner. Despite these difficulties, not only was Ms. McIntyre not discharged or disciplined, but she was given favorable performance evaluations while Petitioner was given poor evaluations. Much of the friction between Petitioner and Ms. McIntyre was related to suggestions for improvement made by Petitioner and adopted by her supervisors. Despite this record of obstruction by Ms. McIntyre and constructive input by Petitioner, Respondent's superviors attempted to belittle Petitioner's accomplishments in performance evaluations, and credited complaints from Ms. McIntyre despite her known antipathy to Petitioner.

Evidence introduced by Respondent to document Petitioner's alleged absentee record included undisputed errors (for example, counting attendance at her own performance evaluation as an unauthorized absence), were skewed in the time periods covered, and did not include the original time sheets, which had suspiciously disappeared prior to trial.

The evidence concerning the specific incident that allegedly precipitated discharge was, of course, disputed. What was not disputed was that the underlying attendance "policy" requiring an employee to give her supervisor the "necessary and compelling reasons for her planned absence" was virtually *never* enforced. Indeed, the actual practice was to permit an employee to take time off for personal matters without providing a detailed explanation provided that accrued vacation or sick time was available, which it was in Petitioner's case. Nevertheless, Petitioner's absence on two occasions—one to attend a BART board meeting at a board member's invitation, and the other to assist her mother following the death of her aunt—were asserted to be the initial basis for discharge. The EEOC determined that there was reasonable cause to believe that Petitioner's charge was true, based upon the disparate application of Respondent's so-called compelling reason absence policy.

Although the district court permitted the introduction of pretext evidence including evidence that Petitioner's accomplishments as Respondent's employee were deliberately belittled, it characterized such evidence as "just so much information" that didn't make "any impact". Indeed, the district court's findings of fact, with its focus on "cause" for discharge, omit any consideration of the evidence of disparate treatment or evidence that the asserted grounds for discharge were in fact pretextual.

The district court placed great emphasis at trial upon Petitioner's lack of physical characteristics indicative of color or race. Repeatedly, the court asked witnesses, and non-witnesses in the court if they believed Petitioner was caucasian. The court had difficulty believing that Mexican-Americans were a protected ethnic group, stating at trial "I can't for the life of me figure out why a Mexican-American is any different than the American or French-American, German-American, or anything else . . . if Mrs. Salazar was black, I would have an entirely different reaction. It's just that I can't identify Mexican-Americans with the black complaint, which is legitimate."

The district court's finding that "no BART Management employee, including her supervisors, was aware of her national origin" is based solely upon the denials of knowledge by Petitioner's former supervisors. The court did not evaluate, consider, or make factual findings or legal conclusions concerning the following undisputed evidence:

1. Respondent's records, including affirmative action and payroll records, identified Petitioner's national origin;

2. Petitioner's surname and maiden name are indicative of foreign national origin;

3. Another co-worker greeted Petitioner in the office in Spanish regularly;

4. Shortly before her discharge, another co-worker heard Petitioner speak Spanish;

5. Petitioner requested the presence of a minority woman at her Merit Evaluations;

6. Prior to her discharge, Petitioner raised race discrimination charges at a grievance hearing attended by her supervisors;

7. Petitioner testified that she told her supervisors her national origin prior to her discharge.

REASONS FOR GRANTING THE WRIT

While this Court has frequently provided guidance as to the appropriate standards of proof to be applied in Title VII disparate treatment employment discrimination cases (see e.g. *Texas Dept. of Community Affairs* v. *Burdine* (1981), 450 U. S....., 101 S.Ct. 1089, *Furnco Construction Corp.* v. *Waters* (1978) 438 U. S. 567; *McDonald* v. *Santa Fe Trail Transportation Co.* (1976) 427 U. S. 273; *McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, it has never considered the type of factual findings required to comply with the mandate of Federal Rules of Civil Procedure, Rule 52(a) that the district court "shall find the facts specially and state separately its conclusions of law thereon. . .", or the appropriate standard of review for ultimate factual findings of discrimination. The latter issue was expressly left open by this Court in *Burdine, supra,* 450 U. S....., 101 S.Ct. 1089, 1097, n.17.

This case squarely presents the issue of whether the district court's judgment based upon its ultimate factual finding that there was no discrimination, and the Ninth Circuit's affirmance based upon the "clearly erroneous" standard of review comply with the mandate of Rule 52(a).[4]

Rule 52(a) serves two related purposes. Specific findings give "the appellate court a clear understanding of the basis of the trial court's decision" and compel the district court to lay a factual foundation for the proper application of relevant legal principles. *Irish* v. *United States* (9th Cir. 1935) 225 F.2d 3, 8; *Otero* v. *Mesa County School District* (10th Cir. 1977) 568 F.2d 1312, 1316. Ultimately, Rule 52(a) forces a trial court to articulate the basis for its decision.

The district court's judgment is not supported with the type of factual findings required by Rule 52(a) and established Title VII case law. The district court's judgment is solely based upon three findings:

1. Its ultimate finding that there was no discrimination involved in the discharge of Petitioner. (Finding No. 15).

2. Its finding that there was good cause to discharge Petitioner. (Finding No. 13).

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[4]The applicability of the Rule 52(a) clearly erroneous standard of review in a related situation is presently before this Court. See *United Steelworkers of America* v. *Swint* (5th Cir. 1980), 624 F.2d 525, cert. granted, (1981) ..... U.S. ....., 101 S.Ct. 1972.

3. Its finding that Petitioner's supervisors were unaware of her national origin. (Finding No. 2).

None of these findings, either individually or together, are sufficient to support the judgment. Nevertheless, the Ninth Circuit's brief memorandum of affirmance is based *solely* upon its application of the clearly erroneous standard of review.

The district court's finding of nondiscrimination embraced the ultimate issue presented in the trial, and accordingly should have been tested by the clearly erroneous rule. The district court's finding cannot conceal "an absence of a critical review of the relevant facts culminating in a coherent body of factual findings which is particularly called for in a discrimination case." *Lewis* v. *Tobacco Workers* (4th Cir. 1978) 577 F.2d 1135, 1146, *cert. den.* (1979) 439 U. S. 1089.

Whether such ultimate findings should be tested by the Rule 52(a) clearly erroneous rule, or whether an appellate court may disregard the findings and independently review the record is an issue that has divided the Circuits. The Ninth and First Circuits have held that the clearly erroneous standard applies even to ultimate findings of no discrimination. See *Piva* v. *Xerox Corp.* (9th Cir. 1981) 654 F.2d 591, 594 n.l; *Sweeney* v. *Board of Trustees, Keene State College* (1st Cir. 1979) 604 F.2d 106, 109 n.l, *cert. den.* 444 U.S. 1045. The Eighth, Seventh and Fifth

Circuits, on the other hand, hold that such findings are reviewable independent of the clearly erroneous rule, although the clearly erroneous rule applies to subsidiary factual findings. See, e.g. *Strecker* v. *Grand Forks County Social Service Board* (8th Cir. 1981) 640 F.2d 96, 99; *Stewart* v. *General Motors Corp.* (7th Cir. 1976) 542 F.2d 445, 449, *cert. den.* 433 U.S. 919; *Causey* v. *Ford Motor Co.*, (5th Cir. 1975) 516 F.2d 416, 420-21; *Jackson* v. *City of Killeen* (5th Cir. 1981)..... F.2d ....., 26 FEP Cases 1515, 1517-18.

Moreover, the Ninth Circuit's affirmance herein fails to address the critical issue of the sufficiency of the district court's factual findings under Rule 52(a). Other Circuits have held that the failure to make subsidiary findings concerning evidence of disparate treatment and pretext constitutes a reversible failure to meet the Rule 52(a) requirement to "find the facts specially." See e.g. *Lewis* v. *Tobacco Workers, supra; Otero* v. *Mesa County School District, supra* at 1316; *Corley* v. *Jackson Police Department* (5th Cir. 1978) 566 F.2d 994, 1000 n.8; Cf. *Marable* v. *H. Walker & Associates* (5th Cir. 1981) 644 F.2d 390, 396 (housing case).

The district court's utter failure to make subsidiary findings of fact concerning substantial evidence of disparate treatment and pretext is not rendered negatory by its "good cause" for discharge finding since this finding did not meet the critical issues raised and the substantial evidence presented at trial.

Indeed, the "central focus of the inquiry" in a Title VII action "is always whether the employer is treating some people less favorably than others because of their . . . sex. . . ." *Furnco Construction Corp.* v. *Waters, supra* at 577 quoting *Teamsters* v. *United States* (1977) 431 U.S. 324, 335 n.15. The existence of good cause to discharge an employee does not immunize an employer from liability under Title VII. See e.g. *McDonald* v. *Santa Fe Trail Transportation Co., supra,* (theft of cargo); *McDonnell Douglas Corp.* v. *Green, supra* (criminal conduct); *Corley* v. *Jackson Police Dept., supra* (acceptance of bribes). Moreover, under the tests articulated by this Court, evidence that "the employer's proffered explanation is unworthy of credence" is central to proof of discrimination, see e.g. *Texas Dept. of Community Affairs* v. *Burdine, supra* at 1095; *Corley* v. *Jackson Police Dept., supra* at 999-1000.

The district court's finding that no management employee was aware of Petitioner's national origin simply ignored the bulk of Petitioner's evidence on the issue. The Ninth Circuit's affirmance similarly ignored the evidence, especially the undisputed evidence that Respondent's own records identified her national origin. As such, this finding also is insufficient under Rule 52(a). Even if the finding was sufficient, however, *it did not address Petitioner's evidence of disparate treatment on the basis of sex.* The district court and Ninth Circuit decision on the sex discrim-

ination claim is thus based solely upon the ultimate finding of no discrimination discussed above.

The district court's incredible finding that Petitioner's supervisors were unaware of her national origin must be rejected for three further reasons:

First, that finding was tainted by the district court's evident confusion over Title VII's definition of national origin. At trial, and in its findings,[5] the court appeared to equate national origin with race or apparent physical characteristics. National origin, although a protected status in Title VII, (42 U.S.C. §2000e-2) is not expressly defined by the Act. The legislative history, however, establishes that this category was intended to cover *all* national groups and groups of persons of common ancestry, heritage or background without regard to race, color or religion. "National origin, of course, has nothing to do with color, religion, or the race of an individual." 110 Cong. Record at 2549 (1964); Schlei and Grossman, *Employment Discrimination Law* (1976) at 246. This Court has explained that national origin "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza* v. *Farah Manufacturing Company* (1973) 414 U.S. 86, 88.

[5]The only subsidiary finding supporting the court's finding of lack of knowledge, other than the finding concerning Petitioner's appearance is a finding that Petitioner told a co-worker she was "white". Although the court's finding suggests that Petitioner also denied she was Mexican-American, nothing in the record supports such a conclusion.

Thus, the race or color of Petitioner, or the specific country of origin, is simply not a relevant factor in determining whether or not Petitioner was discriminated against on the basis of her national origin. Accordingly, the court's finding is tainted by an erroneous view of the law.

Secondly, the district court's failure to consider the undisputed evidence that Respondent's own records identified Petitioner's national origin betrays a failure to apply well-established rules of agency and doctrines implicit in Title VII itself.

Under common law and statute, a corporation's agents are deemed to have notice of a corporation's own records. See, e.g. *Sanders* v. *Magill* (1937), 9 Cal. 2d 145, 154; *Phillips* v. *Sanger Lumber Co.* (1900) 130 Cal. 431, 434; California Civil Code §2332; 1 Witkin *Summary of California Law*, (1973) Agency and Employment §139 at p. 743.

Title VII itself defines employer to include "any agent of such a person", 42 U.S.C. §2000e(b), an express recognition of agency principles. Although no case has directly addressed the issue herein, the statute's definition of employer should be given a liberal construction to effectuate the "remedial purpose of eradicating discrimination in employment." *Spirt* v. *Teachers Insurance and Annuity Assoc.* (*S.D.N.Y.* 1979) 475 F. Supp. 1298, 1308 quoted in *EEOC* v. *Wooster Brush Co.* (N. D. Ohio 1981)..... F. Supp.

....., 26 FEP Cases 1602, 1605; See also *Quijano* v. *University Federal Credit Union* (5th Cir. 1980) 617 F.2d 129, 131; *Baker* v. *Stuart Broadcasting Company* (8th Cir. 1977) 560 F.2d 389, 391. A construction of the definition of employer that embraces an established principle of agency law such as constructive knowledge, or at least a presumption of such knowledge furthers Title VII's remedial purpose. Not only would such a construction help to overcome the nearly insurmountable burden of establishing discriminatory intent in a disparate treatment case, but since the doctrine of constructive knowledge itself embodies a common sense perception verified by long usage, erecting a presumption of knowledge is a "sensible, orderly way to evaluate the evidence in light of a common experience. . . ." *Furnco Construction Corp.* v. *Waters, supra* at 577.

Finally, even a cursory review of the evidence establishes that the court's finding is clearly erroneous. The only evidence on point introduced by Respondent consisted of self-serving denials of knowledge by Petitioner's supervisors. All the objective evidence introduced on the issue, including Respondent's own records, Petitioner's surname, the undisputed evidence of her supervisors presence at grievance hearings where she raised race discrimination issues,[4] and other circumstantial evidence compels

[4]The fact that Petitioner, who is concededly caucasian, styled her grievance as one of race does not undermine the inference that her supervisors were thus on notice as to her national origin. Lay people, as well as judges, often confuse the protected categories of race and national origin.

a finding that Petitioner's supervisors knew of her foreign national origin.[7] Although the testimony of her supervisors is "some evidence", when the rest of the evidence and the district court's own evident confusion as to the relevant characteristics of national origin are considered, "a definite and firm conviction that a mistake has been committed" is compelled, *United States* v. *United States Gypsum Co.* (1948) 333 U. S. 364, 394-5.

CONCLUSION

As noted above this Court has repeatedly had to exercise its discretionary review authority in order to bring lower courts into accord with a correct and consistent articulation of the standards for disparate treatment discrimination cases. Herculean though these efforts may be, lower courts continue to circumvent the correct application of these standards by making conclusory findings while paying lip service to the oft repeated standards for disparate treatment cases. It is only through rigorous application of Rule 52(a) that a district court will be compelled to lay out the basis for its decision, thus revealing whether or not it is in fact applying the correct standards articulated by this Court. This case presents the issue squarely.

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[7]No authority requires proof that Petitioner's supervisors were aware of her specific national origin, so long as they were aware of her *foreign* origin.

Accordingly, Petitioner respectfully requests this Court to grant her petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: November 24, 1981

Respectfully submitted,

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